BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	

PETITION FOR RECONSIDERATION OR,
IN THE ALTERNATIVE,
PETITION FOR FORBEARANCE OF
PRIMECO PERSONAL COMMUNICATIONS, L.P.

PRIMECO PERSONAL COMMUNICATIONS, L.P.

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SUMMARY

PrimeCo Personal Communications, L.P. ("PrimeCo") urges the Commission to reconsider the *Reconsideration Order* in this proceeding, to the extent it suggests that Commercial Mobile Radio Service ("CMRS") carriers are required to integrate interstate, interexchange rates and required to integrate rates across all CMRS affiliates owned or controlled by a CMRS carrier. PrimeCo asks the Commission to find that rate integration does not and should not apply to CMRS carriers. Alternatively, and at a minimum, PrimeCo submits that the Commission must relieve CMRS carriers from the affiliate requirement.

Integration of CMRS interstate, interexchange rates is not required by Section 254(g) and Section 64.1801. Indeed, requiring CMRS rate integration is an expansion of the Commission's rate integration policies which contradicts Congress' expressed intent with regard to the scope of rate integration obligations.

Further, application of rate integration requirements to CMRS carriers will provide no significant rate benefits to consumers, including consumers in non-contiguous, insular points such as Alaska, Hawaii, Guam, Puerto Rico and American Samoa. In fact, rate integration will hamper the continuing development of competition in the CMRS industry and eliminate existing rate benefits of CMRS competition such as wide-area toll-free calling plans.

There are also significant problems associated with implementing rate integration in the CMRS context. For example, CMRS operates without regard to exchange boundaries; it is an end-to-end service in which carriers do not unbundle long distance and local service. It is unclear how CMRS carriers are to integrate rates for such bundled services. In addition, there are numerous instances in which CMRS providers do not assess toll charges for interstate calls, and therefore it is unclear what rates (toll and/or air time) must be integrated. Perhaps most disturbing, it appears that many CMRS carriers cannot comply with the affiliate requirement without violating important anti-trust and pro-competitive policies.

There is no record analyzing either the public interest effects of imposing rate integration upon CMRS carriers or the implementation problems associated with CMRS. In the absence of such a record, Commission action to impose rate integration upon CMRS carriers is patently unlawful.

In the event the Commission does ultimately determine that Section 254(g) requires rate integration for CMRS carriers, Section 10 of the Communications Act compels the Commission to forbear from applying the rate integration provisions to CMRS carriers.

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PETITION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, PETITION FOR FORBEARANCE OF PRIMECO PERSONAL COMMUNICATIONS, L.P.

PrimeCo, an A and B Block broadband PCS licensee,[1] hereby petitions the Commission for reconsideration of several aspects of its *Reconsideration Order*[2] in this proceeding, pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.106. Specifically, PrimeCo urges the Commission to revise the *Reconsideration Order* to the extent it suggests that CMRS carriers are obligated to integrate interstate, interexchange rates and to reconsider its decision to integrate rates across all CMRS affiliates owned or controlled by a CMRS carrier. As discussed below, PrimeCo submits that integration of CMRS interstate, interexchange rates is not required by Section 254(g) and Section 64.1801. Alternatively, and at a minimum, PrimeCo submits that the Commission must relieve CMRS carriers from the affiliate requirement. In the event CMRS carriers are subject to rate integration, however, the Commission should exercise its authority

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1 PrimeCo is the broadband PCS licensee or owns a majority ownership interest and is the sole general partner in the licensee in the following MTAs: Chicago, Milwaukee, Richmond-Norfolk, Dallas-Ft. Worth, San Antonio, Houston, New Orleans-Baton Rouge, Jacksonville, Tampa-St. Petersburg-Orlando, Miami and Honolulu.

2 *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *First Memorandum Opinion and Order on Reconsideration*, FCC 97-269, 62 Fed. Reg. 46,447 (Sept. 3, 1997) ("*Reconsideration Order*").

under Section 10 of the Communications Act to forbear from applying the rate integration provisions of Section 254(g) to CMRS carriers.

I. INTRODUCTION

Section 254(g) of the Communications Act, as amended by the Telecommunications Act of 1996 ("1996 Act") establishes rate averaging and rate integration requirements for providers of interstate, interexchange telecommunications services. The rate integration requirement is contained in the second sentence of that section which provides, in pertinent part: "a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State."[3]

Legislative history of the 1996 Act expresses Congress' intent that Section 254(g) incorporate existing FCC policies concerning rate averaging and rate integration.[4] According to the Senate Report, for example, Section 254(g):

> *simply incorporates in the 1934 Act the existing practice of geographic rate averaging and rate integration* . . . . This provision is not intended to alter existing geographic rate averaging policies as enforced by the FCC on the date of enactment, including the FCC's proceeding entitled "Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands"(61 FCC 2d 380 (1976).[5]

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3 47 U.S.C. § 254(g).

4 *See* H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 132 (1996)("Joint Explanatory Statement").

5 S. Rep. No. 23, 104th Cong., 1st Sess. 30 (1995)(emphasis supplied).

Indeed, as recently as the *Reconsideration Order*, the Commission admitted that "Congressional conferees made clear that Congress intended [S]ection 254(g) to incorporate the Commission's existing rate integration policy."[6]

In March 1996, the Commission issued a *Notice of Proposed Rulemaking* to implement Section 254(g).[7] Therein, and in accordance with the Congressional mandate, the Commission proposed to adopt a rule incorporating its *existing* rate integration policies.[8] No mention was made of extending the rate integration policy to CMRS. Thus, the proposed rule appeared to continue the *status quo*, and no party submitted comments addressing the applicability of rate integration to CMRS.

The Commission also did not address CMRS issues in the *Rate Averaging/ Integration Order*, which adopted the rate averaging and integration rules proposed in the *NPRM* and codified them at 47 C.F.R. § 64.1801.[9] In that order, the Commission asserted that its rate integration rule applies to all affiliates of the same parent. According to the Commission:

> The statute mandates that the Commission require rate integration among all states, territories, and possessions, and this goal is best achieved by interpreting "provider" to include parent companies that, through affiliates, provide service in more than one state.[10]

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6 *Reconsideration Order* at ¶ 2.

7 *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 7141 (1996)("*NPRM*").

8 *Id.* at 7181.

9 *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 9564 (1996). New Commission Rule 64.1801 essentially mirrors the relevant statutory language. 47 C.F.R. § 64.1801.

10 *Rate Averaging/Integration Order,* 11 FCC Rcd at 9598.

The FCC added that "nothing in the record supports a finding that Congress intended to allow providers of interexchange service to avoid rate integration by establishing or using their existing subsidiaries to provide service in limited areas."[11]

Thereafter, GTE requested reconsideration of the FCC's decision to extend rate integration to all affiliates and sought clarification that the term "affiliates" did not include CMRS affiliates.[12] The *Reconsideration Order* denied petitions for reconsideration of the *Rate Averaging/Integration Order*. In that order, the Commission read the phrase "a provider of interstate interexchange telecommunications services" to be ambiguous and therefore open to interpretation "in the way that best comports with our prior rate integration policy."[13] According to the Commission, its pre-existing policies "always required rate integration across affiliates" and had consistently treated AT&T's regional affiliates as one carrier for rate integration purposes.[14] The Commission reasoned further that the petitioners had not suggested "any meaningful limits on the ability of firms to avoid the Congressional mandate of integrated inter-exchange rates by using or creating multiple interexchange carrier subsidiaries, each serving a separate geographic area."[15] Therefore, the Commission found nothing in the statute, legislative

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11 *Id.*

12 GTE Service Corporation Petition for Reconsideration and Clarification at 12 (filed Sept. 16, 1996)("GTE Petition").

13 *Reconsideration Order* at ¶ 14.

14 *Id.*

15 *Id.* at ¶ 15.

history, or the record of this proceeding which undercut its interpretation of Section 254(g) as requiring rate integration across affiliates.[16]

While the *Rate Averaging/Integration Order* addressed the affiliate issue, it was not until the *Reconsideration Order* that the Commission mentioned CMRS with reference to Section 254(g) requirements. Specifically, in the *Reconsideration Order,* the Commission stated that "while the rate integration provision applies to all interstate interexchange telecommunications services and *therefore requires CMRS providers to provide the interstate interexchange CMRS service on an integrated basis in all their states*, it does not require a carrier to offer interexchange CMRS service and other interstate interexchange services under one rate schedule."[17] In support, the Commission asserted that CMRS providers offer interstate interexchange service, but concluded that "interexchange CMRS offerings are not the same service as other interstate interexchange services."[18]

The Commission's newly expressed intention to impose rate integration upon CMRS providers was also reflected in the Commission's order released on the same day as the *Reconsideration Order* which reviewed plans submitted by various telecommunications carriers for implementing rate integration for interstate, interexchange services provided to, or from, Guam, the Commonwealth of the Northern Mariana Islands and America Samoa.[19] Therein, the

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16 *Id.* at ¶ 17. The Commission also took the opportunity to "clarify" that the definitions of "affiliate" and "control" set forth in Rule 32.9000 are to be used to determine whether companies are sufficiently related so that they must integrate rates.

17 *Reconsideration Order* at ¶ 18 (emphasis supplied).

18 *Id.*

19 *Policy and Rules Concerning the Interstate, Interexchange Marketplace,* CC Docket No. 96-61, *Memorandum Opinion and Order*, DA 97-1628 (rel. July 30, 1997).

Commission required Mobile Phoenix Corporation, a carrier that will provide cellular service to Midway Atoll, to comply with the rate integration requirements of Section 254(g). The Commission, however, provided no analysis to support this decision.

II. THE RECORD BEFORE THE COMMISSION DOES NOT SUPPORT A DETERMINATION TO IMPOSE RATE INTEGRATION OBLIGATIONS UPON CMRS PROVIDERS

Simply put, the state of the record regarding the application of rate integration to CMRS, on its face, justifies reconsideration. It is a long-standing principle of administrative law that agency actions must be based upon reasoned decisionmaking. Indeed, the concept of reasoned decisionmaking has been described as "the keystone of the Rule of Administrative Law."[20] Reasoned decisionmaking requires an agency to "articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts."[21] The Commission's decision to impose rate integration with the attendant affiliate rule upon CMRS fails to meet this standard.

As discussed in more detail below, application of rate integration obligations to CMRS providers will have severe repercussions for the CMRS industry and will adversely affect the public interest. However, rate integration obligations and the affiliate requirement were imposed upon CMRS carriers without an evidentiary record or substantive discussion of the

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20 *American Gas Ass'n v. FPC*, 567 F.2d 1016, 1030 (D.C. Cir. 1977).

21 *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970). *See also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). *See also Center for Auto Safety v. FHA*, 956 F.2d 309, 314 (D.C. Cir. 1992)(stating "An agency action is arbitrary and capricious if it rests upon a factual premise that is un-supported by substantial evidence."); *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1316 (D.C. Cir. 1988) (stating the court's task is "to decide whether the means selected by the Commission are lawful, supported by substantial evidence after consideration of relevant factors, and rationally connected to the facts.").

repercussions of such action. Indeed, the rate integration rule and affiliate requirement were imposed upon CMRS carriers almost in passing.

The only discussion of wireless services in the *NPRM* occurred in the context of the Commission's discussion of the appropriate geographic market for interstate, interexchange service. Therein, the Commission asserted that an interstate, interexchange call has three separate market inputs: (1) originating access from point A; (2) interstate transport from point A to point B; and (3) terminating access to point B.[22] As to the second input market, the Commission stated *in a footnote* that this "input market includes all means of connecting point and point B — wireline or wireless — and all network paths between those points. In the future, cellular, PCS, or other wireless interexchange services may provide an effective substitute for interexchange wireline service."[23] Again, this statement was offered as a footnote to the Commission's discussion of the appropriate geographic market for interstate, interexchange telecommunications services. The statement does not constitute substantive analysis of whether to extend rate integration and the affiliate rule to CMRS, nor does it discuss the ramifications of such action.

In comments on the *NPRM*, AMSC Subsidiary Corporation ("AMSC"), a mobile satellite service carrier ("MSS"), opposed being subject to rate integration. AMSC, however, did not argue that CMRS could not or should not be subject to rate integration, but rather argued that

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22 *NPRM*, 11 FCC Rcd at 7169.

23 *Id.* at n.118.

the Commission should forbear from applying rate integration to MSS because MSS is a unique service.[24]

The *Rate Averaging/Integration Order* provided no discussion of the ramifications of applying rate integration and the affiliate rule to CMRS. The Commission only stated "we interpret Section 254(g) to extend to all providers of interexchange service the rate integration policy that previously was applied only to AT&T."[25] The Commission also rejected AMSC's comments, asserting that "AMSC is required by the plain terms of the 1996 Act to integrate the rates charged for its offshore service into the rate structure for its mainland rates."[26] As discussed above, however, AMSC's comments were focussed exclusively on MSS and not on the appropriateness of applying rate integration principles to CMRS in general.

A review of the record reveals that CMRS issues were interjected into this proceeding only peripherally through GTE's petition for reconsideration.[27] GTE challenged the Commission's decision to adopt a broad affiliation rule that would require its subsidiary in the Northern Mariana Islands to be rate-integrated with other GTE subsidiaries. In that context, GTE suggested that a broad reading of the Commission's affiliate rule would lead to the absurd

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24 *See* AMSC Comments (Apr. 19, 1996). The only discussion of CMRS in AMSC's comments was a citation to and discussion of the Commission's proposal to forbear from tariff regulation. *Id.*

25 *Rate Averaging/Integration Order,* 11 FCC Rcd at 9589.

26 *Id.*

27 While U S WEST also filed a petition for reconsideration addressing affiliate aspects of the *Rate Averaging/Integration Order*, that petition dealt only with issues relating to its subsidiaries U S WEST Communications Group and U S WEST Media Group, Inc. *See* U S WEST, Inc.'s Petition for Clarification, or, in the Alternative, Reconsideration at 1 (filed Sept. 16, 1996). U S WEST did not raise questions regarding the application of rate integration in general to CMRS operations.

result of extending rate integration to all other holding companies and their subsidiaries, including CMRS providers.[28]

PrimeCo understands that CTIA subsequently made an *ex parte* presentation which pointed out that CMRS was not covered by Section 254(g) because the statute merely codified the FCC's existing rate integration policy which had never been applied to CMRS.[29] Months later, the state of Hawaii made two *ex parte* presentations urging the Commission to require CMRS providers to integrate their rates.[30] It is on this paltry record that the Commission applied rate integration with the attendant affiliate requirements to CMRS — services to which these obligations did not previously apply.

PrimeCo submits that these limited references to CMRS and rate integration fail to satisfy the Commission's basic legal obligations under the Administrative Procedures Act. Contrary to suggestions by the States of Alaska and Hawaii,[31] the extraordinarily oblique references to CMRS are not adequate to constitute notice of the Commission's intent to depart from prior practice and expand its rate integration policies to include CMRS carriers. The references to CMRS and rate integration in the Commission's orders "are far too slim . . . to bear the weight" Hawaii and Alaska hoist upon it.[32]

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28 *See* GTE Petition at 11-12.

29 *Ex Parte* Presentation of CTIA (Dec. 10, 1996).

30 *Ex Parte* Presentation of Hawaii (Apr. 2, 1997); *Ex Parte* Presentation of Hawaii (July 17, 1997).

31 Comments of the State of Alaska, CC Docket No. 96-61, at 2-3 (filed Sept. 29, 1997) ("Alaska Comments"); Opposition of the State of Hawaii, CC Docket No. 96-61, at 3-6 (filed Sept. 29, 1997)("Hawaii Opposition").

32 *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1361 (D.C. Cir. 1993)(holding that a (continued...)

Further, these sparse references to CMRS do not constitute "reasoned decision-making" sufficient to support the Commission's decision to impose rate integration obligations upon CMRS carriers.[33] As discussed below, there are numerous problems associated with imposing rate integration upon CMRS carriers. For example, CMRS operates without regard to exchange boundaries; it is an end-to-end service in which carriers do not unbundle long distance and local service. It is unclear how CMRS carriers are to integrate rates for such bundled services. In addition, there are numerous instances in which CMRS providers do not assess toll charges for interstate calls, and therefore it is unclear what rates (toll and/or air time) must be integrated. Finally, and perhaps most disturbing, it appears that many CMRS carriers cannot comply with the affiliate requirement without violating important anti-trust and pro-competitive policies.

The Commission's orders, however, make no attempt to "articulate a satisfactory explanation" with regard to these implementation concerns and thus necessarily fail to draw any "rational connection" between the decision to impose rate integration upon CMRS carriers and the ramifications of that act.[34] The record reflects no discussion regarding either application or implementation issues pertaining to CMRS. Indeed, the Commission could not undertake such a discussion because the record contains no information regarding the repercussions of extending

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32 (...continued)
single sentence buried in a footnote as well as subsequent statements by the Commission did not provide adequate notice of the Commission's intention to establish dates after which applications for unserved areas would be accepted.).

33 In fact, the Commission's orders appear virtually *to assume* that rate integration applies to CMRS carriers. The lack of any overt finding or holding by the Commission that rate integration applies to CMRS clearly supports a conclusion that the issue had not been adequately considered by the Commission.

34 *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

the rate integration obligations to CMRS carriers.[35] In short, the Commission's orders are not "tolerably terse" with regard to rate integration in the CMRS context — they are absolutely and "intolerably mute."[36] Accordingly, the decision to impose rate integration upon CMRS carriers announced in the *Reconsideration Order* cannot stand.

III. IMPOSING RATE INTEGRATION AND AFFILIATE REQUIREMENTS UPON CMRS CARRIERS IS FUNDAMENTALLY UNREASONABLE AND CONTRARY TO THE PUBLIC INTEREST

A. CMRS Offerings Cannot Reasonably be Characterized as Interstate, Interexchange Service

Section 64.1801 applies to "all *interstate interexchange* telecommunications services" provided by a carrier and its affiliates.[37] Neither the 1996 Act nor the Communications Act define what constitutes "interstate, interexchange telecommunications services." Nevertheless, the Commission has defined interexchange service in the landline context to be toll service.[38] Telephone toll service, in turn, is defined by the Communications Act as "telephone

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35 Given the necessary anti-competitive results of applying the affiliate rule to CMRS carriers, PrimeCo respectfully submits that the Commission should have consulted with the Department of Justice before taking such action. However, the record reveals no evidence of consultation with the Department. Consultation with the Department at this stage might also prove useful with respect to the competitive issues raised by application of the affiliate requirement to CMRS carriers.

36 *Greater Boston*, 444 F.2d at 851.

37 47 C.F.R. § 64.1801(b).

38 *See Local Competition Order*, 11 FCC Rcd 15499, 15598 (1996), *rev'd on other grounds, Iowa Utilities Board, et al.* v. *FCC, et al.*, 1997 U.S. App. LEXIS 18183 (8th Cir., July 18, 1997).

service between stations in different exchange areas *for which there is a separate charge not included in contracts with subscribers for exchange service.*"[39]

The *Reconsideration Order* assumes that CMRS providers offer such interstate, interexchange service.[40] The issue is not so straightforward, however. Unlike landline-based services, CMRS is a mobile service "that, by [its] nature, operate[s] without regard to state lines as an integral part of the national telecommunications infrastructure."[41] In other words, CMRS constitutes a unique, end-to-end service without regard to "exchanges" or even state boundaries and the provision of interexchange service cannot always be carved out from the underlying service.[42] This analysis does not change where the CMRS carrier essentially resells the long-distance services of another carrier. Long-distance is simply not a separate service in the CMRS context. Indeed, as discussed below, there are many instances in which CMRS carriers provide long distance service without assessing separately stated toll charges or by assessing a highly

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39 47 U.S.C. § 3(48).

40 *Reconsideration Order* at ¶ 18.

41 H.R. Rep. No. 111, 103d Cong., 1st Sess., at 260 (1993), *reprinted in* 1993 U.S.C.A.A.N. 378, 587.

42 *See Telecommunications Carrier's Use of Customer Proprietary Network Information and Other Customer Information,* CC Docket No. 96-115, *Notice of Proposed Rule-making*, FCC 96-221 ¶ 22 (rel. May 17, 1996); *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, CC Docket No. 96-21, *Report and Order*, FCC 96-288 ¶¶ 42-44 (rel. July 1, 1996); Statement of Senator Breaux Regarding Passage of the 1996 Act, 141 Cong. Rec. S1311 (Feb. 26, 1996). While the Commission has acknowledged that CMRS roaming may constitute a form of interstate, interexchange service, *Local Competition Order*, 11 FCC Rcd 16016, it has never required a CMRS carrier charge the same rates for roaming in every market. *See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 FCC Rcd 9462 (1996).

competitive rate for the purpose of attracting new customers and encouraging increased usage by existing customers.

B. Requiring Rate Integration by CMRS Carriers Would be Contrary to the Public Interest

As the CMRS industry has developed over time, many carriers have combined multiple markets (MSAs and RSAs in the case of cellular; MTAs in the case of PCS) to establish multi-state, wide-area local calling areas which enable customers to call anywhere within the combined markets without being assessed a toll charge. Indeed, the Commission has specifically encouraged the development of such wide-area local calling areas. The Commission has long-recognized the efficiencies to be derived from such "area wide systems."[43]

Customers have come to enjoy and expect such wide-area local calling options. Imposing rate integration upon CMRS carriers, however, may require carriers to abandon these beneficial pricing plans. For example, a carrier which provides wide-area local calling plans in some markets may assess a separate toll charge in other markets. Under the rate integration rule, the CMRS carrier would be forced to abandon the wide area rates in order to integrate the rate for interstate, interexchange service with the rates charged in areas in which wide-area calling plans are unavailable.

Further, CMRS rate integration would provide no rate benefits to consumers in non-contiguous, insular points and therefore would not serve the basic purposes of Section 254(g). In the absence of optional toll-free rate plans, there are generally two elements of CMRS long distance rates — a toll charge and an air time charge. Typically, both the toll and air time

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43 *See, e.g., Bloomington-Normal MSA Limited Partnership*, 3 FCC Rcd 3743, 3745 (Mobile Serv. Div. 1988); *citing Madison Cellular Telephone Company*, 2 FCC Rcd 5397 (CCB 1987).

charges vary from one market to the next. If the integration rule requires a CMRS provider to integrate only its toll charges, customers in different geographic markets, including those in non-contiguous, insular points, will still pay different rates for interexchange calls because of variances in air time charges. The only remedy for this problem would be to integrate both toll and air time charges, effectively requiring rate integration for all calls, not just interstate, interexchange calls. Neither result is desirable, or required by law.

Similarly, rate integration is not necessary to protect consumers in non-contiguous, insular points from unjust and unreasonable CMRS long distance rates. As discussed below, the CMRS market is competitive and that competition has spread to non-contiguous, insular points such as Hawaii, Alaska, Guam, Puerto Rico and American Samoa where the Commission has licensed competitive CMRS services. The rigors of competition will be adequate to protect consumers in these areas. Accordingly, PrimeCo submits that the Commission should not impose rate integration obligations upon CMRS carriers.

Moreover, to the extent that the Commission believes that competition is not yet adequate to protect consumers in non-contiguous, insular points, PrimeCo submits that the Commission should consider methods of protecting these consumers that are less intrusive than the rate integration and affiliate requirements currently in place. For example, the Commission could find that carriers may not impose a special rate category for calls to non-contiguous, insular points on a market-by-market basis. In other words, a CMRS carrier that has a rate of $0.XX per minute for any call originating in State A and terminating in the contiguous 48 states must also charge $0.XX per minute for calls to any noncontiguous, insular point, without regard to the long distance rates the carrier may charge in other markets.

C. The Affiliate Requirement Will Have Significant Anti-Competitive Effects

Perhaps the most problematic aspect of applying the Commission's integration rule to CMRS carriers is the affiliate requirement. Application of the affiliate requirement to CMRS providers will have significant anti-competitive effects and could profoundly disrupt existing ownership arrangements for many carriers such as PrimeCo. The *Reconsideration Order* states that the "current definitions of 'affiliate' and 'control' in section 32.9000 of the Commission's rules will be used to determine whether companies are sufficiently related so that they must integrate rates."[44] This reliance upon 47 C.F.R. § 32.9000 makes the reach of the affiliate requirement extraordinarily broad and appears to require rate integration among all affiliated carriers that are either commonly owned *or* controlled.[45]

PrimeCo is owned by two partnerships, each with a 50 percent interest: PCS Nucleus, L.P. and PCSCO Partnership. PCS Nucleus, L.P. and PCSCO Partnership are not carriers; they are intermediary partnerships owned by carriers to manage the PrimeCo partnership. PCS Nucleus, L.P. is owned 50/50 by AirTouch PCS Holding, Inc. and U S WEST PCS Holdings, Inc., which in turn are owned by AirTouch and U S WEST respectively. PCSCO Partnership is owned by Bell Atlantic Personal Communications, Inc., which is owned by Bell Atlantic. Under Section 32.9000, each of the two partnerships is controlled by each of their

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44 *Reconsideration Order* at ¶ 17.

45 *Id.* at ¶ 16 (emphasis supplied). The term "control" means: "the possession directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with, or pursuant to an agreement with, one or more other companies, and whether such power is established through a majority or minority ownership or voting of securities, common directors, officers, or stockholders, voting trusts, holding trusts, affiliated companies, contract, or any other direct or indirect means." 47 C.F.R. § 32.9000.

partners insofar as each partner has the ability to veto or "block" any action taken by its respective partnership. Thus, each of PrimeCo's ultimate three owners — AirTouch, U S WEST, and Bell Atlantic — arguably controls PrimeCo. As a result, a strict reading of the affiliate requirement would require PrimeCo to charge the same prices for its interstate toll services as are charged by its controlling parents. The only way that PrimeCo could comply (other than not providing interstate interexchange services) would be for all three carriers and PrimeCo to agree to charge the identical rates for their respective interstate toll services, an option that raises obvious antitrust and anti-competitive implications.

The affiliate compliance problem does not end with PrimeCo, however, because PrimeCo as well as its controlling carriers share control of other CMRS carriers with other entities. Each of PrimeCo's three owners owns or controls other CMRS carriers in their own right. U S WEST owns U S WEST NewVector Group, Inc., a cellular provider, and will provide PCS service through a separate division of U S WEST. Similarly, AirTouch provides service through a number of separately licensed affiliated entities. Further, in addition to its own CMRS operations, Bell Atlantic is a 50/50 partner with Frontier Corporation of Upstate Cellular Network. In some cases, each of these CMRS carriers also share control with yet other entities in other licensees. Thus, if taken to its extreme, the affiliate requirement could arguably be viewed as not only requiring rate integration between all of PrimeCo's license entities, but also as requiring AirTouch, U S WEST and Bell Atlantic to integrate their interstate, interexchange rates as well as the rates of all other CMRS carriers they own or with whom they share control. In turn, these "third generation" carriers could be trapped in this rate integration chain.

In short, given the existing ownership structures of the CMRS industry, application of the affiliate requirement could easily require CMRS carriers to agree to set a few

(or possibly a single) national interexchange, interstate rate for CMRS long distance offerings.[46] Such a result, on its face, could arguably constitute unlawful price fixing and would run counter to important antitrust policies. Indeed, this result is directly contrary to the important pro-competitive purposes of the 1996 Act.[47] Moreover, PrimeCo believes that it is unlikely that anyone would benefit from standardizing CMRS long distance rates in this way. As discussed above, it is likely that in order to integrate rates CMRS carriers would be forced to move away from low-cost wide area calling plans, resulting in higher rates for consumers. Therefore, the Commission must, at a minimum, relieve CMRS carriers from the obligation to integrate rates across affiliates.[48]

IV. INTEGRATION OF CMRS INTERSTATE, INTEREXCHANGE RATES IS NOT REQUIRED BY SECTION 254(g) OF THE COMMUNICATIONS ACT

As demonstrated above, there is no basis for the Commission's decision to impose rate integration and the affiliate obligation upon CMRS carriers. Further, it would be unreasonable and contrary to the public interest for the Commission to require integration among CMRS carriers. Therefore, the Commission should determine that CMRS carriers are not subject to the rate integration requirements of Section 254(g). Excluding CMRS carriers from

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46 *See* BellSouth Corporation's Comments in Support of PrimeCo's Motion for Stay of Enforcement, CC Docket No. 96-61, at 9, Attachments A-C (filed September 29, 1997)("BellSouth Comments").

47 The legislative history makes clear that the 1996 Act was intended to establish a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening up all telecommunications markets to competition." Joint Explanatory Statement at 1.

48 PrimeCo notes in this regard that even Alaska and Hawaii admit that some form of relief from the affiliate requirement is appropriate. *See* Alaska Comments at n.3; Hawaii Opposition at 10-11.

the rate integration obligations of Section 254(g) would be consistent with the fundamental intent of that provision.

The application of rate integration to CMRS providers was not mandated by the terms of the statute but arose as a matter of statutory interpretation by the Commission.[49] Indeed, the Commission held that the terms of Section 254(g) are ambiguous and therefore open to interpretation "in the way that best comports with our prior rate integration policy."[50]

The Commission's interpretation of Section 254(g) as applying to CMRS carriers, however, goes well beyond its prior rate integration policy. In fact, this interpretation contradicts the limitations upon the application of Section 254(g) expressed in the legislative history. Indeed, the Commission itself has determined that Section 254(g) was intended to codify existing Commission rate integration policies.[51] Nothing in the legislative history

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49 *See Rate Averaging/Integration Order,* 11 FCC Rcd at 9589 (stating "we interpret Section 254(g) to extend to all providers of interexchange service the rate integration policy that previously was applied only to AT&T.").

50 *Reconsideration Order* at ¶ 14.

51 *Id.* at ¶ 2. The Joint Explanatory Statement provides:

> "New section 254(g) is intended to incorporate the policies of geographic rate averaging and rate integration of interexchange services in order to ensure that subscribers in rural and high cost areas throughout the Nation are able to continue to receive both intrastate and interstate interexchange services at rates no higher than those paid by urban subscribers. The conferees intend the Commission's rules to require geographic rate averaging and rate integration, and to incorporate the policies contained in the Commission proceeding entitled "Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland and the Offshore Points of Hawaii, Alaska and Puerto Rico/Virgin Islands" (61 FCC 2d 380 (1976)). The conferees are aware that the Commission has permitted interexchange providers to offer non-average rates for specific services in limited circumstances (such as services offered under Tariff 12 contracts) and intend that the Commission, where appropriate, could continue to authorize limited exceptions to the general geographic

(continued...)

indicated that Congress intended rate integration to be applied more broadly. Moreover, CMRS is not mentioned in Section 254(g) or the legislative history.

This is unsurprising because the Commission's rate integration policies were never before applied to CMRS. The Commission first established a rate integration policy in 1972. Prior to this time, interstate, interexchange service to Alaska and Hawaii and other insular non-contiguous points was provided at international rates that were much higher than the domestic rates applicable to the contiguous 48 states.[52] In light of this pricing differential, the Commission adopted a policy requiring a provider of "domestic interstate interexchange service between the contiguous forty-eight states and various offshore points to integrate its rates for offshore points with rates for similar services on the mainland."[53] Stated simply, this policy prohibited interstate, interexchange providers from providing service to their subscribers in one state at rates higher than the rates charged to their subscribers in another state.[54] According to the Commission, this policy was reasonable because the development of satellite

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51 (...continued)
rate averaging policy using the [forbearance] authority provided by new section 10 of the Communications Act. Further, the conferees expect that the Commission will continue to require that geographically averaged and rate integrated services, and any services for which an exception is granted, be generally available in the area served by a particular provider. In addition, the conferees do not intend that this subsection would require the renegotiation of existing contracts for the provision of telecommunications services."

Joint Explanatory Statement at 132.

52 *See, e.g., Domestic Communications Satellite Facilities*, Docket No. 16495, *Second Report and Order*, 35 FCC 2d 844 (1972) ("*Domsat Second Report*").

53 *Reconsideration Order* at ¶ 2.

54 *See NPRM*, 11 FCC Rcd at 7180.

communications substantially eliminated the cost differential between providing service to contiguous and non-contiguous points.[55]

In the *1976 Integration of Rates and Services Order*, the Commission required interexchange carriers offering message toll, private line, and specialized services to or from Alaska, Hawaii, Puerto Rico, and the Virgin Islands to integrate their rates for those services into the rate structures and uniform mileage rate patterns applicable to the mainland.[56]

As a result of these decisions, interstate, interexchange providers were required to offer service to Alaska and Hawaii at the same rates available in the rest of the country. CMRS carriers, however, were never subject to this policy. Thus, by stating that Section 254(g) is intended to codify existing Commission rate integration policy, the legislative history of that provision implicitly excludes CMRS carriers from the rate integration mandate. In light of this legislative history then, the Commission need not (and should not) interpret Section 254(g) as applying to CMRS.

Excluding CMRS from rate integration obligations would also be consistent with the fact that CMRS is fundamentally different from other services. Indeed, the FCC expressly found in this proceeding that "interexchange CMRS offerings are not the same service as other interstate interexchange services."[57] The 1996 Act excluded CMRS carriers from any requirement to provide equal access to common carriers for the provision of telephone toll

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55 *Domsat Second Report*, 35 FCC 2d at 856-67; *NPRM*, 11 FCC Rcd at 7180-81.

56 *See Integration of Rates and Services, Memorandum Opinion, Order and Authorization*, 61 FCC 2d 380, 383-84 (1976).

57 *Reconsideration Order* at ¶ 18.

services,[58] further evidencing Congress' intent to treat CMRS long distance services differently from landline services. Moreover, the FCC has treated CMRS carriers differently from other carriers for regulatory purposes in the past in a variety of contexts.[59] Finally, as discussed below, the Commission has recognized that the CMRS industry is highly competitive and thus traditional rate regulation such as rate integration is not necessary to protect consumers. The rigors of the competitive marketplace eliminate opportunities and incentives for CMRS carriers in all jurisdictions (including Alaska and Hawaii) to establish unjust or unreasonable rates or to otherwise act in an anticompetitive and discriminatory manner. PrimeCo submits therefore that the Commission can lawfully exclude CMRS providers from rate integration obligations as a class based on the unique characteristics of the industry.

V. ALTERNATIVELY THE COMMISSION SHOULD FORBEAR FROM APPLYING THE RATE INTEGRATION PROVISIONS OF SECTION 254(g) TO CMRS CARRIERS

The 1996 Act granted the Commission expanded forbearance authority. Specifically, new Section 10(a) of the Communications Act *requires* the Commission to forbear from applying any regulation or provision of the Act to a class of telecommunications carriers in any of their geographic markets if:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

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58 47 U.S.C. § 332(c)(8).

59 *See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd. 1411, 1511 (1994)("*CMRS Second Report and Order*").

> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest."[60]

In determining whether forbearance is consistent with the public interest, the Commission must "consider whether forbearance would promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[61]

As described below, PrimeCo believes that new Section 10 compels the Commission to forbear from imposing Section 254(g) rate integration requirements on CMRS carriers, if such requirements do in fact apply to CMRS carriers. At a minimum, however, the Commission must forbear from applying the affiliate requirement to CMRS given the significant anti-competitive effects of that requirement.

A. The CMRS Industry is Competitive

PrimeCo submits that the CMRS market is competitive, and this competition justifies forbearance with regard to rate integration of CMRS long distance service. In its most recent Annual Report to Congress, the Commission made clear that the CMRS industry is competitive and that competition continues to develop throughout the industry.[62] Since 1995, the Commission has issued 102 MTA A and B Block licenses, most of the 493 BTA C block licenses, approximately 1400 BTA D, E, and F Block licenses for broadband PCS; 43 national

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60 47 U.S.C. § 160(a)(1)-(3).

61 *Id.* at § 160(b).

62 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 7 Com. Reg. (P&F) 1 (1997).